STATE OF MICHIGAN
IN THE SUPREME COURT

THERESA BEALS, as Personal Representive of the Estate of WILLIAM T. BEALS, Deceased,

Plaintiff-Appellee,

v

STATE OF MICHIGAN and WILLIAM J. HARMON, jointly and severally,

Defendants,

WILLIAM J. HARMON, jointly and severally,

Defendant-Appellant.
_____/

Supreme Court No. 149901

Court of Appeal Case No. 310231

Barry County Circuit Court
Case No. 11-45-NO
Hon. Amy McDowell

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF FOR PURPOSES OF MOAA

* * *

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF JUDGMENT APPEALED FROM AND RELIEF SOUGHT

The Court of Appeals' July 1, 2014 unpublished opinion in this case (attached as Exh 1 hereto) affirmed the Barry County Circuit Court's denial of summary disposition to government employee William J. Harman[1] pursuant to MCR 2.116(C)(7) and MCL 691.1407(2), because, viewing the facts in the light most favorable to the non-movant, there is a question of material fact for the jury as to whether the Harman's grossly negligent conduct was "the proximate cause" of Plaintiff's injury and death. (Exh 1, at *2).

Judge O'Connell (the only one of four judges who have now reviewed this case) dissented from this decision, claiming that "Harmon's alleged failure to intervene was part of a chain of events that resulted in Mr. Beals's death," and "[a] chain of events . . . cannot logically be the *one most direct and immediate cause* of a death, and as such cannot be the source of tort liability against a governmental employee." *Id.* at *6 (citing *LaMeau v City of Royal Oak*, 490 Mich 949; 805 NW2d 841 (2011) (adopting the dissent of Talbot, J., in *LaMeau v City of Royal Oak*, 289 Mich App 153, 194-195; 796 NW2d 106 (2010))).

The trial court and Court of Appeals majority properly reviewed the evidence to find a question of material fact as to whether Harman's grossly negligent conduct was "the proximate cause" of William Beals' injury and death such that Harman's Application for Leave to Appeal should be denied.

[1] Defendant-Appellant contends the proper spelling of his last name is "Harman" as opposed to "Harmon" and "Harman" will be employed throughout the Brief.

STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction to consider Defendant-Appellant William J. Harman's Application for Leave to Appeal pursuant to MCR 2.301(A)(2) because it was filed within 42 days after the filing of the Court of Appeals' July 1, 2014 unpublished per curiam opinion in Docket No. 310231 in compliance with MCR 7.302(C)(2)(b).

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals properly affirmed the trial court's denial of summary disposition pursuant to MCR 2.116(C)(7) and MCL 691.1407(2) to Defendant William J. Harman, because, viewing the admissible evidence in the light most favorable to Plaintiff and making all legitimate inferences in her favor, there is a question of material fact as to whether complete dereliction of his lifeguarding duties and failure to monitor and scan the pool and be attentive to its patrons was "the proximate cause," i.e., the one most immediate, efficient, and direct cause, of William T. Beals' injury and death.

Defendant-Appellant answers: "No."

Plaintiff-Appellee contends the answer is: "Yes."

I. INTRODUCTION

This case involves the drowning death of Michigan Career and Technical Institute ("MCTI") student William T. Beals during a student recreational swim. The only lifeguard staffing the pool at the time was the Defendant-Appellant, MCTI student lifeguard William J. Harman, who suffers from both attention deficit disorder ("ADD") and a learning disability. Ample evidence demonstrates that Harman was never positioned in the elevated lifeguard stand that would have given him the American-Red-Cross-recommended vantage point for monitoring and scanning the pool. Harman was completely distracted by conversation, had his back turned to the pool, played ball with himself and otherwise displayed behavior generally associated with ADD rather than monitoring and scanning the pool. When another student swimmer observed Harman's body at the bottom of the deep end of the pool and repeatedly tried to summon assistance, ***even then*** Harman did not respond. Only after the fellow student pulled Beals to the surface did Harman finally emerge from self-absorbed reverie and take some action. By then it was too late, William Beals had been submerged for approximately eight minutes. The preliminary report of Plaintiff's expert, professional Aquatics Safety and Water Rescue Consultant Gerald M. Dworkin, opines that Beals's death "could have been and should have been easily prevented," that failures by MCTI and Harman resulted "in the prolonged, unrecognized, and fatal submersion" of Beals, and that timely rescue would have provided a window of opportunity "for a successful outcome with early CPR, early defibrillation, and early Advanced Cardiac Life Support." (Exh 10, p 32).

In moving for summary disposition pursuant to MCR 2.116(C)(7) and MCL 691.1407(2), Defendant did not contend that his conduct was not grossly negligent, only that his grossly negligent conduct did not constitute "the proximate cause" of Williams Beals' damages and

death. "The proximate cause" for purposes of determining whether an individual government actor is nonetheless entitled to governmental immunity despite their grossly negligent conduct contributing to the the injury and damages of a personal injury claimant, is defined a "the one most immediate, efficient, and direct cause." *Robinson v City of Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000). Properly viewing the evidence in the light most favorable to Plaintiff, with all reasonable inferences made in Plaintiff's favor, the trial court properly found a question of material fact as to whether William J. Harman's gross negligence was "the proximate cause" of William T. Beal's death. The Court of Appeals properly affirmed.

II. STATEMENT OF FACTS

MCTI is a vocational training school in Plainwell, Michigan. (Exh 2, Complaint, ¶ 5; Exh 3, Answer, ¶ 5). All MCTI students are disabled. MCTI "conducts vocational and technical training programs and provides the supportive services needed to prepare Michigan citizens with disabilities for competitive employment."[2]

William T. Beals was a 19-year-old young man diagnosed with autism/Aspberger Syndrome and a learning disability. (Exh 4, Plaintiff's Answers to Defendants' Third Set of Discovery 12-9-11, Answer to Interrogatory 1). Mr. Beals drowned on May 19, 2009, while using the MCTI swimming pool during a student recreational swim. He had recently begun the program at MCTI, with dreams of becoming a video game designer, when the incident occurred. (Exh 2, ¶ 6; Exh 3, ¶ 6). At the time of the incident, there were approximately 20-30 students in the pool and it was being supervised by only one student lifeguard, Defendant William J. Harman, and no adult MCTI staff members were present. (Exh 2, ¶ 13; Exh 3, ¶ 13; Exh 5, Rodarte Dep, p 24; Exh 6, Brinningstaul Dep, p 33). Harman has known disabilities: ADD and a

[2] http://www.michigan.gov/dhs/0,4562,7-124-5453_25392_40237_40242-129664--,00.html

learning disability. (Exh 7, Harman Dep, p 16).

The entire incident at issue in this litigation was captured by a video security/surveillance camera. While its is grainy and of low resolution, the video footage nonetheless shows Beals swimming then submerging underwater. Tragically, he never voluntarily resurfaced. (Application, Exh D, Video Footage). At the time that Beals submerged, Lifeguard Harman was completely distracted from his primary lifeguarding responsibilities: public safety and patron surveillance. Harman admits that he was distracted:

Q. Do you feel you were distracted that day?

A. Maybe a little bit with the girls, you know . . . . [(Exh 7, p 75).]

Perhaps distracted is too generous of a characterization. During the eighteen minutes of video footage of the events preceding the discovery of William Beals on the bottom of the pool, including the approximately eight minutes Mr. Beals was submerged, Lifeguard Harman was ***completely preoccupied*** by flirting with girls, walking around aimlessly, sitting along the pool edge and playing with a ball. (Application, Exh D; Exh 8, Mtn Hrg Trans 3-29-12, pp 32-33).

Other students noticed Lifeguard Harman's preoccupation that day:

Q. Did you notice William Harman, the lifeguard, did you notice him that day?

A. Yes, I did.

Q. Okay. And what did you notice about him?

A. He was a bit more talkative than usual. I think he had a girlfriend in the pool or he was flirting with some girls at the time.

Q. How much time was Harman spending talking to his friend – his girlfriend or the girls that he was talking to?

A. I'd say a little bit more than he should have. About – if – if I had to put it on a percentage scale, I would say about 56 percent of the time he was talking to them.

Q. Did you think he was distracted?

A. Yes, I do.

Q. Did you notice him doing anything else besides talking to the girls?

A. He was playing with a football, which I personally don't believe he should have been doing in the first place. [(Exh 6, Brinningstaull Dep, pp 38-39).]

Not once within this eighteen minute time period was Lifeguard Harman seen sitting in the elevated lifeguard observation stand located along the side of the swimming pool that would have given him the American-Red-Cross-recommended vantage point for monitoring and scanning the pool. (Exh 6, pp 39-40). When William Beals was discovered at the bottom of the pool, Lifeguard Harman was on the deck of the shallow end of the swimming pool tossing a basketball to himself. (Exh 7, Harman Dep, p 53).

Another student swimmer, Matthew Brinningstaull, first observed Harman's body at the bottom of the deep end of the pool and tried to summon assistance by shouting out "Hey lifeguard" on three separate occasions, but Harman was totally distracted and did not respond. (Exh 6, p 41). Brinningstaull then brought Beals to the surface himself, and, upon reaching the surface, he saw that his swimming companion had finally gotten Harman's attention. (Exh 6, pp 41-42). After Brinningstaull brought Beals to the surface, Harman ***then*** began blowing his whistle and jumped into the pool to pull Beals out onto the deck. (Exh 6, p 42). Brinningstaull stated that he shouted loud enough to be heard by Harman and if Harman had not been "too busy talking" with girls at the shallow end of the pool, he would have heard him repeatedly shout for assistance.

Q. Do you think he heard you or could have heard you?

A. If he was too busy talking, I don't believe he could have, honestly. But he—he should—I believe he should have been able to keep his ears open and I believe he should have been able to hear me.

Q. Do you think if given the same amount of people, the noise and commotion or whatever was going on at the time, ***do you think that anyone could have heard you shout "lifeguard" from where he was at?***

A. ***Oh, yeah.*** Oh, yeah. Because in the automotive shop we have to be really loud because we have loud air tools, and ***it was pretty loud. I echoed several times, so . . . I had like five people stare at me when I shouted.***

[(Exh 6, pp 42-43) (emphasis added).]

When William Beals was removed from the pool, Harman began to assess Beals' condition. (Exh 7, pp 56, 58-60, 68). Mr. Beals was ultimately transported to Borgess-Pipp Health Center in Plainwell, Michigan. He arrived at the hospital at 9:39 p.m. and was pronounced dead at 9:45 p.m. in the emergency department by Dr. Jose Fuentes. (Exh 9, Prairieville Township Incident Report, p 4). His stated cause of death was drowning. (Exh 9, p 4 and Exh 10, Preliminary Expert Witness Report of Gerald M. Dworkin, p 12).

Plaintiff's expert, Gerald M. Dworkin, "a professional Aquatics Safety and Water Rescue Consultant," authored a preliminary report on the incident in which he opined that: Beals's death "could have been and should have been easily prevented," that Harman's failure to attend to his lifeguarding duties and be attentive and undistracted resulted "in the prolonged, unrecognized, and fatal submersion" of Beals, and that timely rescue would have provided a window of opportunity "for a successful outcome with early CPR, early defibrillation, and early Advanced Cardiac Life Support." (Exh 10, p 32).

III. PROCEDURAL HISTORY

This lawsuit was filed by Theresa Beals, as Personal Representative of the Estate of William T. Beals, following her son's drowning death.

A. Trial Court Proceedings

Plaintiff brought suit against the individual lifeguard, William Harman, and the State of Michigan in January 2011, asserting that Harman's grossly negligent conduct in breaching his duty of care to Beals was the proximate cause of Beals' drowning death and that MCTI was liable under the Persons with Disabilities Civil Rights Act, MCL 37.1101 et seq. (Exh 2, Counts I-II, respectively). Defendants moved for summary disposition, with Harman seeking summary

disposition pursuant to MCR 2.116(C)(7) on the basis of governmental immunity, MCL 691.1407(2). (Exh 11, Brief in Support of Defendants State of Michigan and William J. Harman's Motion for Summary Disposition ("MSD"), pp 3-7).

Defendant Harman ***did not*** argue for summary disposition on the basis that his actions did not constitute gross negligence. Rather, Harman's argument was that, "[b]ecause there was no gross negligence that was the proximate cause, Plaintiff fails to state a claim against William Harman for negligence. (Exh 11, MSD, ¶ 3 and Brief, pp 3-4, 7 (quoting *Robinson v City of Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000)). Harman argued this is because "[t]he video surveillance confirms that William Harman did not cause Beals to disappear under the surface of the water" and "the mere possibility that the decedent could have been rescued does not satisfy the proximate cause requirement." (Exh 11, p 7).

Plaintiff responded that this case's facts are wholly different from the authorities relied upon by Harman in support of his argument that his gross negligence was not the proximate cause of Beals' injury. (Exh 12, Resp MSD, p 11). In those cases, the respective plaintiffs were a more immediate, efficient and direct cause of injury or damage than the government official defendants and no question of material fact was presented on the issue. (Resp MSD, pp 11-12). In this case, by contrast, William Beals was acting reasonably and prudently under the circumstances: he was an accomplished swimmer, had been swimming for years, and was swimming with friends at a pool supposedly monitored by a trained on-duty lifeguard. There is no evidence that Mr. Beals drowned intentionally or through his own negligence, but rather his submerged body went unnoticed for nearly eight minutes by William Harman,[3] whose sole

[3]Plaintiff's Response asserted that Beals went unnoticed by Harman for nearly eighteen minutes, which time period was acknowledged as inaccurate and corrected to a time period of "probably more along the lines of eight minutes" at the motion hearing. (Exh 8, p 33).

responsibility is to monitor the safety of pool patrons.

Plaintiff responded that this case bears remarkable similarity to *Avery v Roberts*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2005 (Docket No. 253068), lv denied 474 Mich 1027 (2006) (Exh 13), in which the Court of Appeals found a question of material fact for the jury as to whether the lifeguard's distraction amounted to gross negligence that was the proximate cause of the drowning. (Exh 12, pp 15-16; Exh 13, at *3).

In a supplemental response, Plaintiff additionally alerted the trial court to *In re Estate of Anderson*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2012 (Docket No. 295317), lv denied 493 Mich 869 (Exh 14), which was issued after oral argument. (Exh 15, Supp'l Resp MSD). *Anderson* found a question of material fact for the jury as to whether two swimming supervisor defendants were grossly negligent, where one instructor failed to instruct on safety, administer a swim test and left the pool area and the other violated Mich Admin Code R 325.2198(3)(e), which mandates that lifeguards not perform "activities that would distract from the proper supervision of persons using the swimming pool or prevent immediate attention to a person in distress." *Anderson* likewise found a question of material fact as to whether the instructors' negligence was the proximate cause of plaintiff drowning. (Exh 15, Supp'l Resp MSD, p 2; Exh 14, at *4-*5).

After hearing oral argument on March 29, 2011 (Exh 8), the trial court denied summary disposition to the Defendants at a May 8, 2012 hearing, which ruling was then memorialized in the trial court's May 11, 2012 Stipulated Order.

B. The Court of Appeals July 1, 2014 Unpublished Opinion Per Curiam

In its decision, the Court of Appeals affirmed the Barry County Circuit Court's denial of summary disposition of Plaintiff's gross negligence claim against Defendant student lifeguard

William J. Harman, an individual government actor, pursuant to MCR 2.116(C)(7) and MCL 691.1407(2).[4] (Exh 1, at *2). The Court of Appeals found that a reasonable jury, viewing the evidence in the light most favorable to Plaintiff, could conclude that his distraction and failure to monitor the pool and notice Beals' distress and respond appropriately by intervening in a timely fashion constituted the one most immediate, efficient, and direct cause of Beals' death. (Exh 1, at *2). The Court of Appeals noted the preliminary report of professional Aquatics Safety and Water Rescue Consultant Gerald M. Dworkin, which opined that: Beals' death "could have been and should have been easily prevented," that failures by MCTI and Harman resulted "in the prolonged, unrecognized, and fatal submersion" of Beals, and that timely rescue would have provided a window of opportunity "for a successful outcome with early CPR, early defibrillation, and early Advanced Cardiac Life Support." (Exh 1, at *2; Exh 10, p 32). The Court of Appeals concluded, "[i]n short, there is evidence to indicate that proper intervention and rescue could have prevented Beals's death." (Exh 1, at *2).

Judge O'Connell wrote separately to dissent from the majority's decision:

> The undisputed facts establish that defendant Harmon was not the one most immediate, efficient, and direct cause of Mr. Beals's death. Indeed, the majority recognizes the four key facts of Mr. Beals's death: Mr. Beals was an accomplished swimmer; he swam to the deep end of the pool; he submerged; and he did not resurface. Harmon's actions had no effect on these events. Nonetheless, the majority contends that reasonable minds could differ regarding whether Harmon could have *intervened* and *prevented* Mr. Beals's death (majority opinion, unpub op at 5). In other words, the majority recognizes that Harmon's alleged failure to intervene was part of a chain of events that resulted in Mr. Beals's death. A chain of events, however, cannot logically be the *one most direct and immediate cause* of a death, and as such cannot be the source of tort liability against a governmental employee. See *LaMeau v Royal Oak*, 490 Mich 949; 805 NW2d 841 (2011) (adopting the reasoning of Talbot, J., dissenting,298 [sic, 289] Mich App 153, 194-195; 796 NW2d 106 (2010)). [(Exh 1, at *6 (O'Connell, J.

[4] The Court of Appeals unanimously reversed the Barry County Circuit Court's denial of summary disposition as to Plaintiff's claim that the State of Michigan violated Mr. Beals' rights under the Person's With Disabilities Civil Rights Act.

(concurring in part and dissenting in part)).]

Harman then filed a timely Application for Leave to Appeal.

IV. STANDARD OF REVIEW

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

When reviewing a motion for summary disposition under MCR 2.116(C)(7), the Court must consider not only the pleadings, but also "all affidavits, pleadings, and other documentary evidence," construing them in the light most favorable to the nonmoving party. *Jackson v Saginaw Co*, 458 Mich 141, 142; 580 NW2d 870 (1998); MCR 2.116(G)(5). Likewise, the reviewing court must also "make all legitimate inferences in favor of the nonmoving party." *Id*.

A motion under MCR 2.116(C)(7) should be granted only if no factual development could provide a basis for recovery and the moving party is entitled to judgment as a matter of law. *See Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002); *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 617; 513 NW2d 428 (1994).

While the following language comes from a case addressing whether there was a question of material fact as to whether conduct was "a" proximate cause of personal injury, as opposed to "the" proximate cause, it nonetheless should equally inform and guide the Court for purposes of the standard of review on the issue of whether a reasonable juror could find conduct was "the" proximate cause of an injury:

> If the facts bearing upon other aspects of "proximate cause" (that is, aspects other than causation in fact) are not in dispute and reasonable persons could not differ about the application to those facts of the legal concept of "proximate cause," the court determines that issue. *But if reasonable persons could differ*, either because relevant facts are in dispute *or because application of the legal concept of 'proximate cause' to the case at hand is an evaluative determination as to which reasonable persons might differ, the issue of 'proximate cause' is submitted to the jury with appropriate instructions on the law*."

McMillan v State Highway Comm'n, 426 Mich 46, 63; 393 NW2d 332 (1986) (emphasis original) (quoting Prosser & Keeton, Torts (5th ed.), § 44, p 321).

V. ARGUMENT

A. Pertinent Legal Authority

MCL 691.1407 provides, in part:

> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the . . . employee . . . while in the course of employment or service . . . if all of the following are met:
>
> (a) The . . . employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The . . . employee's . . . conduct does not amount to gross negligence that is ***the proximate cause*** of the injury or damage.
>
> * * *
>
> (7) As used in this section:
>
> (a) "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. [(Emphasis added).]

Gross negligence suggests "almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). "It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge." *Id.* If reasonable jurors could honestly reach different conclusions regarding whether conduct constitutes gross negligence, the issue is a factual question for the jury. *Jackson*, 458 Mich at 146-147.

"'Proximate cause' is a legal term of art that incorporates both cause in fact and legal (or 'proximate') cause." *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). In *Robinson v City of Detroit*, this Court interpreted the phrase "the proximate cause" in MCL

691.1407(2)(c) to mean "the one most immediate, efficient, and direct cause of the injury or damage." *Robinson*, 462 Mich at 462. This definition was first set forth in *Stoll v Laubengayer*, 174 Mich 701; 140 NW 532 (1913), which the *Robinson* Court relied on, stating that "the Legislature has nowhere abrogated this . . . ." *Robinson*, 462 Mich at 462. The determination of cause in fact is usually an issue for the jury to determine where the evidence is disputed and where reasonable minds can differ. *Schuette v Celotex Corp*, 196 Mich App 135, 138; 492 NW2d 773 (1992). Moreover, "if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence." *Scott v Illinois Tool Works*, 217 Mich App 35, 40; 550 NW2d 809 (1996), lv den 455 Mich 861 (1997) (quoting *Kaminski v Grand Truck W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956)). Given the applicable standard of review requiring the evidence to be viewed in the light most favorable to the non-movant and with all reasonable inferences made in non-movant's favor, this should be no less true under *Robinson*'s more rigid "the proximate cause" test.

In *Stoll*, a five-year-old child suffered fatal injuries after she sledded down a hill, directly into the path of defendant's wagon and team of horses, which were parked at the bottom of the hill. *Stoll*, 174 Mich at 702-703. The child slid under the wagon against the heels of the horses and was either run over by the wagon wheel or kicked by a horse. *Id.* at 703. The plaintiff alleged that the defendant negligently parked its wagon across the path, left it unguarded, and failed to warn the young child of the danger of coasting down the path. *Id.* The jury returned a verdict in favor of plaintiff and defendant appealed. *Id.* at 704.

On appeal, the *Stoll* defendant argued, in part, that his negligence was not the proximate cause of the child's death. *Id.* at 704. The Supreme Court agreed, holding that the defendant's

alleged negligent act preceded the girl's decision to slide down the hill. The Court concluded that the "immediate cause" of the injury was the child's act of voluntarily starting her sled run down the hill. *Id*. at 706. "But for this act of hers (subsequent to defendant's alleged negligent act, and therefore proximate to the injury) no accident could have occurred." *Id*. Notably, there is no indication in *Stoll* that the plaintiff was unable to observe the defendant's wagon and team of horses parked at the bottom of the hill when she made the decision to start sledding down the hill towards them. The *Stoll* Court held that the girl's action was "the immediate, efficient, direct cause preceding the injury." *Id.* at 706.

Similarly, in *Robinson*, the plaintiffs in two different actions brought claims against the police officers involved in police pursuits that eventually resulted in crashes and subsequent injuries to the plaintiffs. The individual officers claimed that they were not "the proximate cause" of the plaintiffs' injuries. This Court agreed, holding that—consistent with *Stoll*—the "one most immediate, efficient, and direct cause of the plaintiffs' injuries was the reckless conduct of the drivers of the fleeing vehicles." *Robinson*, 462 Mich at 462. That is, but for the fleeing, no accident could have occurred.

B. The Court of Appeals Correctly Found, Viewing the Evidence in the Light Most Favorable to Plaintiff, That There Is a Genuine Issue of Material Fact as to Whether the Grossly Negligent Conduct of Defendant William Harman Was the Proximate Cause of Plaintiff's Decedent's Injury and Death

1. Judge O'Connell's Dissenting Opinion Misstates the Basis for the Michigan Supreme Court's Decision in LaMeau v City of Royal Oak *and Is Plainly Wrong*

Judge O'Connell's dissent from the Court of Appeals majority opinion affirming the denial of summary disposition to Defendant Harman is plainly wrong. *Lameau v City of Royal Oak*, 490 Mich 949; 805 NW2d 841 (2011), ***did not*** hold that "[a] chain of events . . . cannot logically be the *one most direct and immediate cause* of a death" as his dissent claims. (Exh 1, at

*6). Rather, it held that the individual government actor defendants' "actions in designing and constructing the sidewalk to cross the guy wire and their failure to ensure movement of the obstruction in a timely manner by DTE, arguably ***contributed to, and initiated***, a chain of events that led to the decedent's injury" and that these actions could not be the one most immediate, efficient, and direct cause of plaintiff's injury as they less immediate, efficient, and direct causes than DTE's and plaintiff's ***intervening*** negligent actions. *Lameau v City of Royal Oak*, 289 Mich App 153, 193-94; 796 NW2d 106 (2010) (dissenting opinion), rev'd *LaMeau v City of Royal Oak*, 490 Mich 949; 805 NW2d 841 (2011). DTE, despite acknowledging that moving the guy wire was a "rush job," failed to timely do so and this ***omissive conduct*** and ***failure to act*** was found to be "a more 'direct' and 'immediate' cause of the injuries." *Id.* at 194. Proximate cause is that which, in a natural and continuous sequence, ***unbroken by new and independent causes***, produces the injury. *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985).

Contrary to Judge O'Connell's opinion, viewed in the light most favorable to Plaintiff, with all reasonable inferences made in Plaintiff's favor, Harman's gross negligence did not merely "contribute[] to, and initiate[], a chain of events that led to the decedent's injury," nor were there more proximate intervening causes than Harman's gross negligence as was the case in *Lameau*. Further, contrary to Defendant Harman's improperly argumentative and biased summary of the proceedings below, the Court of Appeals did not conflate the immunity concepts of gross negligence and the proximate cause or confuse Harman's breach of duty with causation.[5] (Application, pp 6-7). Rather, Harman's grossly negligent conduct in breaching his

[5] This "conflation" argument may actually be Defendant's effort to insert the issue of whether his conduct constituted gross negligence for the first time at this very late stage of the appellate process. However, as Harman admits and the Court of Appeals found, this issue was not raised in the trial court. (Application, pp iv, 6; Exh 1, at *1). Accordingly, this issue is unpreserved and not properly considered by this Court.

duty of care to Beals was ***the last significant link in a chain of events*** resulting in Mr. Beals' drowning death and therefore was the one most immediate, efficient, and direct cause.

To the extent Judge O'Connell's opinion may be asserting that "the proximate cause" means the ***one and only or sole*** cause and therefore "[a] chain of events . . . cannot logically be the *one most direct and immediate cause* of a death,"[6] this is in plain contravention of *Robinson* and its progeny. *Robinson* only uses the word "sole" once in its majority decision where it notes that an earlier decision of this Court, *Dedes v Asch*, 446 Mich 99; 521 NW2d 488 (1994), explained that "the" proximate cause does not mean "sole" proximate cause. *Robinson*, 462 Mich at 458 (citing *Dedes*, 446 Mich at 107). *Robinson* overruled *Dedes* "to the extent that it interpreted the phrase 'the proximate cause' in . . . [MCL 691.1407(2)(c)] to mean 'a proximate cause.'" *Id.* "The Legislature's use of the definite article 'the' clearly evinces an intent to focus on one cause." *Id.* at 458-459. However, *Robinson* ***did not*** overrule *Dedes* to the extent it "***further*** explained that 'the' proximate cause does not mean 'sole' proximate cause," nor did it hold that "the" proximate cause means the one and only or sole proximate cause. *Id.* at 458 (emphasis added).

In *Robinson*, this Court interpreted the phrase "the proximate cause" in MCL 691.1407(2)(c) to mean "the one ***most*** immediate, efficient, and direct cause of the injury or damage." *Id.* at 462 (emphasis added). This language plainly contemplates other ***less*** immediate, efficient and direct causes of injury or damage. Defendant fails to quote any language from *Robinson* or its ample progeny defining and applying this definition of "the" proximate cause to preclude liability under MCL 691.1407(2)'s exception to governmental immunity for employees of a governmental agency where other less immediate, efficient and direct causes of injury or

[6] (Exh 1, at *6 (O'Connell, J. (concurring in part and dissenting in part)).

damage are present, i.e., where there is a chain of events and the governmental employees gross negligence is not the one and only or sole cause. Accordingly, "the" proximate cause ***does not*** mean the one and only or sole cause.

Frankly, there is ***never*** a circumstance where the gross negligence of a governmental employee is the ***one and only or sole cause*** of injury or damage. For example, in the instant case, the very fact that William Beals's mother sent him to MCTI was "a" cause of his drowning death, because otherwise he would not have been at the school and able to attend the lifeguarded student swim at the MCTI pool facility. To adopt Judge O'Connell's dissent and grant summary disposition on the ground that "[a] chain of events . . . cannot logically be the *one most direct and immediate cause* of a death," and to thereby read "the" proximate cause to mean the ***one and only or sole*** proximate cause, would eliminate the exception found at MCL 691.1407(2) and establish absolute immunity for employees and officers of governmental agencies, which, based on the plain language of the statute, the Legislature obviously never contemplated.

2. The Court of Appeals' Unpublished Decisions in Avery v Roberts *and* In re Estate of Anderson *Found Their Respective Plaintiffs' Claims Survived Summary Disposition Based on Governmental Immunity Under MCR 2.116(C)(7) on Facts Virtually Identical to Those in the Present Case and the Courts Below Properly Reached Same Result Here*

Bizarrely, as he did in his Brief on Appeal to the Court of Appeals, Defendant falsely claims that Plaintiff relies upon *Perry v McCahill*,[7] for the proposition that a failure to rescue could constitute proximate cause of an injury. (Application, pp 13-14 and Exh K; Harman's Brief on Appeal, p 10 and Exh 2). On the contrary, **Defendant *sua sponte* raised and distinguished *Perry* in its Motion for Summary Disposition and Plaintiff has never relied upon it!** (Exh 11, MSD, p 5). Defendant's basis for factually distinguishing the Court of Appeals decision in *Perry*,

[7] Unpublished opinion per curiam of the Court of Appeals, issued April 30, 2002 (Docket No. 224556).

that the plaintiff's decedent had a history of seizures and drowned when she had a seizure, is inaccurate. (Application, p 13). ***Viewing the evidence in the light most favorable to plaintiff, the Perry Court found it must assume that plaintiff's decedent died from accidental drowning.*** (Application, Exh K, at *7).

Further, Defendant Harman asserts it is somehow significant to this case that this Court reversed the Court of Appeals decision in *Perry* and reinstated the trial court's grant of summary disposition based on the reasons stated in Judge O'Connell's dissenting opinion. *Perry v McCahill*, 467 Mich 945; 656 NW2d 525 (2003); (Application, pp 13-14). This is of no import to the present appeal as Judge O'Connell's *Perry* dissent found no reasonable jury could find the *Perry* defendants "grossly negligent." (Application, p 14 and Exh K, at *15-*21). Here, on the other hand, Defendant does not contest that Harman's conduct constituted gross negligence and the only issue is whether, viewing the evidence in the light most favorable to Plaintiff, a reasonable jury could find that Defendant Harman's gross negligence was "the proximate cause" of William T. Beals' drowning death.

In any event, the Court of Appeals' more recent decisions in *Avery v Roberts*[8] and *In re Estate of Anderson*[9] (on which Plaintiff actually relies) constitute compelling authority directing denial of Defendant's Application. Those cases address facts nearly identical to those in the present case. In each of those cases, the Court of Appeals found a question of material fact as to whether the lifeguard/swim instructor was grossly negligent and whether such gross negligence was "the proximate cause" of the plaintiff's damages, and any factual distinctions between those cases and the present one are not such as to compel a different result.

[8] Unpublished opinion per curiam of the Court of Appeals, issued March 22, 2005 (Docket No. 253068), lv denied 474 Mich 1027 (2006) (Exh 13)

[9] Unpublished opinion per curiam of the Court of Appeals, issued April 19, 2012 (Docket No. 295317), lv denied 493 Mich 869 (Exh 14).

In *Avery*, five lifeguards were working at the city pool on the day of the drowning. At the time decedent's body was discovered in the pool's shallow end, Lifeguard One had left her station at the pool's shallow end to use the restroom, Lifeguards Two and Three had left the park, Lifeguard Four was stationed at the pool's deep end, and it is disputed whether Lifeguard Five had returned from the restroom in substitution for Lifeguard One (who had left to use the restroom). (Exh 13, at *1). The *Avery* Court, viewing the evidence in the light most favorable to plaintiff, noted that "[a]ll of the lifeguards undisputedly had the responsibility to protect the safety of the pool occupants," "[m]ost important is the fact that the purpose of defendants' jobs was to make sure that those in the pool do not drown," and there was evidence that Lifeguards Two and Three abandoned their posts to smoke marijuana behind a building. (Exh 13, at *2-*3). Based on this, the *Avery* Court affirmed the trial court's ruling that there was a question of material fact as to whether the actions of Lifeguards Two and Three were "so reckless as to demonstate a substantial lack of concern for whether an injury results," i.e., gross negligence. (Exh 13, at *3).

The *Avery* Court rejected the argument of Lifeguards Two and Three that the one most immediate, efficient, and direct cause of the injury or damage was the inability of plaintiff's decedent to swim, not their actions in abandoning their posts:

> Under the circumstances that plaintiff's decedent was properly in the shallow end of the pool, where non-swimmers are allowed to be in the water, and that the job of a lifeguard is to respond when those in the pool are in trouble, ***we agree with plaintiff that while plaintiff's decedent's inability to swim might be the most immediate, efficient and direct cause of his distress, a reasonable jury could conclude that the absence of the lifeguards was the most immediate, efficient and direct cause of his drowning***. [(Exh 13, at *3) (emphasis added).]

Transferring this analysis to the extremely similar facts of the present case, William Beals

was "an accomplished swimmer, who had been swimming independently for years,"[10] such that he was properly swimming in the pool's deep end, and the job of a lifeguard is to respond when those in the pool are in trouble. ***Just as in Avery, while whatever unknown difficulty Mr. Beals encountered that caused him to struggle and then submerge might be the most immediate, efficient and direct cause of his distress, a reasonable jury could conclude that the complete distraction of the lifeguard from attending to his duties was the most immediate, efficient and direct cause of William Beals' drowning.*** Contrary to Defendant Harman's argument, the fact that Mr. Beals may have been a competent swimmer in the deep end of the pool, while plaintiff's decedent in *Avery* was a non-swimmer who drowned in the shallow end, does not serve to distinguish the Court of Appeals' decision. (Application, p 13). As the Court of Appeals found questions of material fact on the issues of gross negligence and "the proximate cause" in *Avery*, so this Court should find the trial court and Court of Appeals properly found a question of material fact as to the issue of "the proximate cause" in this case and deny Defendant's Application.

In *Anderson*, the two defendant physical education instructors were both certified to teach aquatics. (Exh 14, at *1). Instructor One's seventh grade class was on its last day of swim lessons and Instructor Two's sixth grade class, including plaintiff's decedent, was visiting the pool for the first time. With more that 50 students in attendance, the instructors decided to let them have "free swim time," during which Instructor Two left the pool deck to enter attendance on a computer in a room overlooking the pool. Instructor One "remained to supervise the students, but also apparently supervised a make-up swim test for one student." (Exh 14, at *1). At some point in the free swim time, plaintiff's decedent slipped under the water. When Instructor Two

[10] (Exh 12, p 12; Exh 4, Response Interrogatories 10 and 15).

returned to the pool deck, he saw plaintiff's decedent at the bottom of the pool and immediately jumped in after him. Plaintiff's decedent was removed from the pool, the Instructors commenced efforts to resuscitate him, and emergency responders arrived shortly thereafter and moved him to a hospital where he died several days later. (Exh 14, at *1).

The *Anderson* Court affirmed the trial court's findings that there were questions of material fact as to whether the Instructors were grossly negligent and whether their negligence was the proximate cause of plaintiff's decedent's death. Regarding Instructor One, whose behavior bears extremely close resemblance to that of Defendant Harman in the present case, "there was evidence that he did not comply with Rule 325.2198 of the Michigan Administrative Code, which states that a lifeguard must not perform '[a]ctivities that would distract from the proper supervision of persons using the swimming pool or prevent immediate attention to a person in distress.'" (Exh 14, at *3 (quoting Mich Admin Code, R 325.2198(3)(e)). Students testified that they could hear plaintiff's decedent call out for help from the corner of the pool and he was discovered under the water directly across from where Instructor One had stood watch. There was also evidence that Instructor One was attending to a student who was performing a make-up swim test when he should have been concentrating on the students engaged in the free swim. The *Anderson* Court found this evidence supported the inference that Instructor One "was distracted and not properly observing the pool to safeguard the students under his sole supervision, or outright ignored . . . plaintiff's decedent's plight." (Exh 14, at *4). Viewed in the light most favorable to plaintiff, the *Anderson* Court found the trial court properly determined that there was a question of material fact as to whether Instructor One's "actions and omissions amounted to gross negligence under the totality of the circumstances." (Exh 14, at *4).

The Instructors in *Anderson* argued that the proximate cause of the plaintiff's decedent's

death "was his weak swimming ability and his decision to go into the deep end of the pool." (Exh 14, at *4). The *Anderson* Court noted that plaintiff's decedent was found near the point where the shallow end drops off into deeper water, that that drop off was not marked on the pool to provide notice to a swimmer and "there was also no evidence that . . . [plaintiff's decedent] violated any pool rules or behaved at all negligently." (Exh 14, at *5). In contrast, the court found the Instructors, as lifeguards, "***had an obligation to ensure the safety of their charges and to respond to those who might be in trouble in the pool***." (Exh 14, at *5). Under these facts, the *Anderson* Court found that a reasonable jury could conclude the Instructors' acts and omissions amounted to the one most immediate, efficient, and direct cause of plaintiff's decedent's death.

Transferring this analysis to the extremely similar facts of the present case, here the video footage and witness testimony amply demonstrates that, from well before the time William Beals encountered whatever unknown difficulty that caused him to submerge under the water in the deep end of the pool, until after Defendant Harman was repeatedly called for assistance by a student swimmer, Matthew Brinningstaull, who first spotted Beals at the bottom of the pool, Harman was completely distracted and absorbed in tossing a ball to himself and talking with girls. Brinningstaull called for Harman's attention and assistance three times loudly enough that others heard him and Harman should have heard him, yet Harman was completely preoccupied and did not respond. As was the case with Instructor One in *Anderson*, the evidence demonstrates that Harman did not comply with Rule 325.2198(3)(e) of the Michigan Administrative Code, which states that a lifeguard must not perform "[a]ctivities that would distract from the proper supervision of persons using the swimming pool or prevent immediate attention to a person in distress." Likewise as with Instructor One in *Anderson*, the evidence supports the inference that Harman was distracted and not properly observing the pool to

safeguard the students under his sole supervision, or outright ignored Beals' plight. Likewise as with Instructor One in *Anderson,* if others could hear Brinningstaull yelling for help, then a reasonable inference is that an attentive and responsive lifeguard would have heard him as well. (This is especially so since Instructor One was lifeguarding 50 sixth and seventh grade students in *Anderson*, whereas here Harman was only lifeguarding approximately 20-30 older individuals, such that one can infer that the pool area would have been less noisy and chaotic). The *Anderson* Court, looking to the evidence in the light most favorable to plaintiff, concluded that there was a genuine issue of material fact as to whether Instructor One's actions amounted to gross negligence under the totality of the circumstances, and had this issue been raised in the trial court, it would properly reach the same conclusion based upon what are virtually identical facts.

With regard to whether Harman's grossly negligent conduct was "the proximate cause" of Beals' drowning death, just as in *Anderson*, there is no evidence that Beals violated any pool rules or behaved at all negligently, whereas, in contrast, Harman, as the pool's sole lifeguard had an obligation to ensure the safety of his charges and to respond to those who might be in trouble in the pool, yet acted in complete dereliction of such duties.

As the *Anderson* Court found a reasonable jury could conclude that Instructor One's acts and omissions amounted to the one most immediate, efficient, and direct cause of plaintiff's death, so this Court should find as to with regard to Defendant William J. Harman on these virtually identical facts.

3. Defendant's Argument That This Court Should Attribute William Beals' Drowning Death to Some Unknown Intervening Health Issue, Such as an Aneurism, and, Based Thereon, Find No Question of Material Fact That Defendant Harman's Gross Negligence Was the Proximate Cause Is Absurd and Turns the Standard of Review of a MCR 2.116(C)(7) Motion on Its Head

Defendant Harman's Application argues:

> [I]f an identical swimmer had drowned because of an aneurism, it would be easy to acknowledge that the aneurism would be the most immediate cause of his drowning, and not the lifeguard's response. True, a lifeguard might have intervened and prevented the aneurism from causing the drowning, but the aneurism would still be the most direct cause. The fact that we do not know what caused Beals to slip to the bottom [of the pool] does not make that unknown factor any less the cause. [(Application, p 13).]

First of all, Defendant's hypothetical consideration of an aneurism is obviously pure speculation with absolutely no record support. In any event, assuming arguendo that there was some evidence that Mr. Beals suffered an aneurism or other intervening health issue while at the student swim that caused him to slip to the bottom of the pool, that fact alone does not conclusively establish and it is not "easy to acknowledge" that, viewing the evidence in the light most favorable to Plaintiff and making all reasonable inferences in Plaintiff's favor, there would not be a question of material fact as to whether William J. Harman's grossly negligent conduct in breaching his duty of care to Beals was the proximate cause of Beals' drowning death.

For example, in *Estate of Sherrill Turner v Nichols*,[11] plaintiff's decedent suffered what appeared to be a cardiac-related medical emergency and plaintiff's decedent's minor son called 911 for assistance just before 6:00 p.m. (Exh 16, at *1-*2). The 911 operator failed to send assistance in response to the call, despite saying that she would send police to the home, and only sent assistance after a second call from the son approximately three hours later. (Exh 16, at *1). A police officer arrived at the residence at approximately 9:30 p.m., the officer summoned emergency medical services which arrived at 9:40 p.m., and plaintiff's decedent was declared dead at 9:59 p.m. (Exh 16, at *1). The Court of Appeals noted that no evidence indicated the decedent's death was immediate or certain to occur at the time the son initially called 911 and

[11] Unpublished opinion per curiam of the Court of Appeals, issued Dec 7, 2010 (Docket Nos. 288375, 291287, 296198) (Exh 16), lv gtd *Patterson v Nichols*, 489 Mich 937; 797 NW2d 642 (2011), order granting lv vacated by *Estate of Turner v Nichols*, 490 Mich 988; 807 NW2d 164 (2012).

she was noted by the responding officer to be "warm to the touch with no rigor present" when he arrived three-and-a-half hours after the son's initial call. (Exh 16, at *2). Based on these facts, the Court of Appeals found:

> But, a question of fact clearly exists regarding whether the underlying medical event or defendants' failure to provide the requested medical assistance was "the proximate cause," i.e., the one most immediate, efficient, and direct cause of decedent's death. In other words, ***there is no evidence that the underlying medical event would have certainly killed decedent, i.e., there was no chance of survival, or that the decedent would not have survived even with proper and timely medical assistance. Accordingly, there appears to be evidence from which a reasonable jury could conclude that defendants' gross negligence was the one most immediate, efficient, and direct cause of death***. [(Exh 16, at *3) (emphasis added.]

As in *Turner*, even if Mr. Beals suffered an aneurism or other health issue that caused him to struggle and submerge beneath the pool's surface (*and there is absolutely no evidence in the record of this whatsoever*) there would nonetheless be a question of material fact for the jury as to whether Harman's gross negligence was "the proximate cause" of Beals' drowning death. See also, e.g., *Perry v McCahill* (Application, Exh K), at *7 (viewing the evidence in the light most favorable to plaintiff, the Perry Court found it must assume that plaintiff's decedent died from accidental drowning, not seizure activity).

This is particularly so in light of the opinion offered in Gerald M. Dworkin's preliminary report that Beals's death "could have been and should have been easily prevented." (Exh 10, p 32). Had William Harman "position[ed] himself in the elevated lifeguard stand, William's distress could have and would have been easily recognized in a timely fashion, and intervention could have occurred prior to the onset of cardiac arrest." *Id.* Instead Harman "randomly walk[ed] around the edge the pool and engage[d] in activities that intruded upon and/or distracted him from his public safety and surveillance responsibilities." *Id.* These failures resulted "in the prolonged, unrecognized, and fatal submersion" of Beals, and timely rescue would have

provided a window of opportunity "for a successful outcome with early CPR, early defibrillation, and early Advanced Cardiac Life Support." *Id.*

Defendant's argument that, despite the fact that the evidence is to be viewed in the light most favorable to the Plaintiff and all reasonable inferences are to be made in Plaintiff's favor, a court should instead guess at some "unknown factor" that "caused Beals to slip to the bottom" rather than find a question of material fact for the jury as to whether Harman's grossly negligent conduct was the proximate cause of his drowning death is absurd and turns the standard of review of a MCR 2.116(C)(7) motion on its head. *Jackson*, 458 Mich at 142. Accordingly, the Court of Appeals affirmation of the trial court's denial of summary disposition to Defendant Harman was proper and Defendant's Application should be denied.

4. Unlike the Court of Appeals Decisions in Avery *and* Anderson*, the Scattershot Litany of Cases Relied Upon in the Harman's Application for Leave to Appeal Are Readily Distinguished and Do Not Direct a Different Result Than Was Reached by the Trial Court and Court of Appeals*

Unlike the Court of Appeals decisions in *Avery* and *Anderson*, the scattershot litany of cases relied upon in Harman's Application for Leave to Appeal are readily distinguished and do not direct a different result than was reached by the trial court and the Court of Appeals.

The plaintiff in *Kruger v White Lake Township*, 250 Mich App 622; 648 NW2d 660 (2002), was an arrestee who escaped and fled police custody, ran into traffic and was killed by an oncoming vehicle. In *Oliver v Smith*, 290 Mich App 678; 810 NW2d 57 (2010), the Court of Appeals held that the trial court erred in denying defendant summary disposition on plaintiff's gross negligence claim because plaintiff actively resisted arrest and the evidence showed that plaintiff's injury was "not clearly attributable to defendant alone and instead may just as fairly be attributed to plaintiff." *Id.* at 687. In *Harbour v Correctional Med Servs, Inc*, 266 Mich App 452; 702 NW2d 671 (2005), a personal injury action brought by the estate of a person who died in a

jail cell after being arrested for OUIL, the trial court granted defendant's motion for directed verdict after five days of trial on the basis of a statutory impairment defense found in MCL 600.2955(a). *Id.* at 454-455. In *Cummins v Robinson*, 283 Mich App 677; 770 NW2d 421 (2009), when plaintiffs had alternative courses of action rather than undertaking economically impracticable and unnecessary rebuilding, and other factors played a part in plaintiffs' financial problems and stress, the building officials' interpretation of the building code was found not to be "the proximate cause" of plaintiff's financial losses. *Id.* at 694-695. Harman's Application also cites *Cooper v Washtenaw County*, 270 Mich App 506; 715 NW2d 908 (2006), in which the plaintiff's decedent committed suicide (an intentional act of harm against himself).

The alleged gross negligence by governmental actors in the foregoing cases was found not to constitute "the proximate cause" of the alleged injury because there was no question of material fact that the respective plaintiffs or plaintiff's decedents' degree of fault was greater than the respective defendants'. In other words, the respective plaintiffs were each a more immediate, efficient, and direct cause of the injury or damage than were the government actors. Therefore, those cases are distinguished from the present matter where the evidence, viewed in the light most favorable to William Beals, shows that he was at all times acting reasonably and prudently under the circumstances. Mr. Beals was not evading arrest or escaping custody, he was participating in a student swim. The evidence shows that Beal's death was caused by no fault of his own. He was an accomplished swimmer and had been swimming independently for years. There is no evidence that he drowned intentionally, through his negligent acts or due to some intervening health issue, but rather, the video shows him, for whatever reason, submerge beneath the surface water and never return to the surface on his own. On the other hand, the video surveillance shows that Mr. Beals' safety went totally unmonitored by Defendant William

Harman, the only lifeguard on duty, for nearly 18 minutes, and that Mr. Beals being submerged in the deep end of the pool went completely unnoticed for approximately 8 of those 18 minutes. Defendant Harman's sole responsibility as a lifeguard is to monitor the safety of pool patrons and he is the last line of defense against a mishap occurring in the pool and thus his gross negligence resulting in Mr. Beals' drowning death was the one most immediate, efficient, and direct cause.

In support of Defendant Harman's argument that he was not "the proximate cause" of Mr. Beals' drowning death, the Application cites *Curtis v City of Flint*, 253 Mich App 555; 655 NW2d 791 (2002), in which the city-owned ambulance *was not even involved* in the collision for which plaintiff alleged injury. Harman's Application also cites *Miller v Lord*, 262 Mich App 640; 686 NW2d 800 (2004), where plaintiff was sexually assaulted by a fellow student after the defendant teacher sent her out of the classroom and into the hallway as a reprimand. The court held that the most immediate, direct cause proceeding injury was the sexual assault, not the teacher's act of banishing the student into the hallway. *Id.* at 644. In *Rakowski v Sarb*, 269 Mich App 619; 713 NW2d 787 (2006), plaintiff's injury occurred because the handrail was nonsecure and the foreseeability of harm was found to have a closer nexus to the construction of the ramp than to the limited, visual inspection conducted by the municipal building inspector defendant (who owed plaintiff no duty). *Id.* at 631-632. Likewise, in *Manuel v Gill*, 270 Mich App 355; 716 NW2d 291 (2006), the most immediate, direct cause of any injuries to the plaintiffs, who were voluntary confidential informants, was the threatening conduct of the targets of the undercover operation, and the argument that an individual defendant disclosed the identity of plaintiff as a confidential informant would arguably not be protected by governmental immunity as it is outside the scope of employment or outside the exercise or discharge of a governmental

function (but in any event lacked evidentiary support). *Id.* at 379-380. In *Tarlea v Crabtree*, 263 Mich App 80; 687 NW2d 333 (2004), plaintiff's decedent died— not from the coaches' purported failure to monitor his safety—but from a rare bacterial infection after an intervening week in the hospital. *Id.* at 92-93. In *Love v City of Detroit*, 270 Mich App 563; 716 NW2d 604 (2006), the court determined that the proximate cause of decedents' deaths was a deliberately set fire, i.e., an act of arson. There was no evidence in the record in *Love* that the firefighters could have reached the victims by the time they arrived at the scene. *Id.* at 566.

In contrast to these cases, Defendant Harman was on duty as a lifeguard at the pool and, had he not been completely distracted from his duties "to protect the safety of the pool occupants" and "make sure that those in the pool do not drown,"[12] there is evidence that he would have noticed Mr. Beals struggle and go under the water, would have observed Beals' body at the bottom of the deep end of the pool and/or would have heard Matthew Brinningstaull when he repeatly called "Hey lifeguard" upon observing Beals' body at the bottom of the pool, and that timely rescue would have provided a window of opportunity "for a successful outcome with early CPR, early defibrillation, and early Advanced Cardiac Life Support." (Exh 13, at *2; Exh 10, p 32). Accordingly, as the Court of Appeals concluded, "[i]n short, there is evidence to indicate that proper intervention and rescue could have prevented Beals's death." (Exh 13, at *2).

Unlike the foregoing cases, in this case, Defendant Harman was affirmatively charged with the responsibility of monitoring swimmers' safety, but he instead acted in compoplete dereliction of such duty. He was required to but failed to comply with Rule 325.2198(3)(e) of the Michigan Administrative Code, requiring that he not perform "[a]ctivities that would distract from the proper supervision of persons using the swimming pool or prevent immediate attention

[12] (*Avery*, Exh 13, at *2-*3).

to a person in distress." Unlike *Miller*, William Beals did not drown due to the criminal intervention of a third party. Unlike *Miller,* drowning was a known risk and result of Defendant Harman's inattentiveness to his lifeguarding duties. The teacher in *Miller* did not know and could not reasonably foresee that the student sent to the hallway would be sexually assaulted. Rather than a week's hospitalization and a bacterial infection intervening as the cause of plaintiff's death in the *Tarlea* case, here the only evidence indicates that William T. Beals died from drowning. There is no evidence to suggest that William caused his own peril or that some other interevening cause contributed to his death. To the contrary, Defendant Harman caused William's drowning by not monitoring his safety and timely responding to his distress, i.e., by failing to *lifeguard*.

The only pool/drowning case Harman relies on,[13] *Watts v Nevils*,[14] does not apply to the entirely different facts of this case. In *Watts*, the key factor underlying the court's decision was simply that plaintiff had not presented *any* evidence suggesting that the defendants' actions or inactions was the one most immediate, efficient, and direct cause of Watts' death. (Exh 17, at *2). There, decedent's drowning death occurred in a hotel pool during a school field trip and the defendants were chaperones and an administrator, not lifeguards, who were not present at the pool at the time. There was no requirement that certified lifeguarding services be provided (with such lifeguards having a duty not to perform "activities that would distract from the proper supervision of persons using the swimming pool or prevent immediate attention to a person in distress" pursuant to Rule 325.2198(1)-(3) of the Michigan Administrative Code), as was the case at the MCTI pool and in *Avery* and *Anderson*. (Exh 17, at *1).

[13] Aside from falsely claiming Beals relies upon *Perry* and then attempting to distinguish that case, as discussed *supra*.

[14] Unpublished opinion per curiam of the Court of Appeals, issued Sept 18, 2007 (Docket No. 267503) (Exh 17).

Harman's Application contends that this Court has reversed all three post-*Robinson* published Court of Appeals opinions holding that failure to rescue or prevent injury can constitute "the proximate cause." (Application, p 15). That contention is simply not true and those three cases are readily distinguished from the present case. In *Dean v Childs*, 474 Mich 914; 705 NW2d 344 (2005), this Court adopted the opinion of dissenting Court of Appeals Judge Griffin, who ultimately found summary disposition proper for defendants because plaintiffs conceded—in the allegations of their original, amended and second amended complaints—that the cause of death was the fire itself, not defendant's alleged gross negligence in fighting it. *Dean v Childs*, 262 Mich App 48, 61-62; 684 NW2d 894 (2004) (Griffin, J., dissenting). There is certainly no similar concession in the Complaint in this case that the proximate cause of Beals' death was the water in the MCTI pool. (Exh 2).

As discussed earlier in the context of Judge O'Connell's dissenting opinion in this case, in *LaMeau v City of Royal Oak*, 490 Mich 949; 805 NW2d 841 (2011), this Court reversed the Court of Appeals decision finding a question of fact as to whether the individual city employees arguably grossly negligent conduct was "the proximate cause" of plaintiff's damages, for the reasons stated in the Court of Appeals dissenting opinion. Those reasons are that:

> Despite . . . [the individual defendants'] initial actions, the decedent did not incur injury until he was traveling at night without lights or a helmet at a potentially unsafe speed while drunk and struck the guy wire, which DTE had failed to relocate . . . . Hence, *the decedent's own behavior, combined with that of DTE*, comprised a more "direct" and "immediate" cause of the injuries incurred than the actions attributed to . . . [the individual defendants]. [*LaMeau v City of Royal Oak*, 289 Mich App 153, 194; 796 NW2d 106 (dissenting opinion) (emphasis added).]

The third case, *Beebe v Hartman*, unpublished opinion per curiam of the Court of Appeals, issued Nov 9, 2010 (Docket No. 292194) (Exh 18), *vacated in part* 489 Mich 956 (2011), does not even involve governmental immunity. In that case, plaintiff broke his leg in a

snowmobile accident while operating the vehicle under the influence of alcohol, filed a medical malpractice action, and defendants relied on the defense in MCL 600.2955(a), based upon plaintiff's intoxication. *Beebe*, therefore, merits no further discussion.

Once again, these cases are based upon facts readily distinguished from the facts surrounding William Beals' drowning death. Before briefly struggling and submerging in the pool's deep end, Mr. Beals was making appropriate use of the pool facility. He was not acting carelessly or negligently in any way. There is no evidence of any cause of Mr. Beal's distress, e.g., he was not attacked, pulled under water, and did not suffer a health issue such as a seizure or aneurism. Instead, he was swimming in a normal and reasonable manner while Defendant Harman utterly ignored his responsibility to be attentive to the safety of the pool patrons. But for Defendant Harman's complete distraction, he would have recognized Mr. Beals' distress and submersion and initiated rescue sooner. (Exh 10, p 32). Gerald Dworkin's preliminary expert report opines that timely rescue would have provided a window of opportunity "for a successful outcome with early CPR, early defibrillation, and early Advanced Cardiac Life Support." (Exh 10, p 32). There is thus a question of material fact for the jury as to whether William Beals drowned as the direct and proximate consequence of William Harman's gross negligence.

5. Sur-Reply to Defendant's Reply Brief in Support of His Application for Leave to Appeal

Defendant's Reply Brief in support of his Application relies entirely upon *Dean v Childs*, 474 Mich 914; 705 NW2d 344 (2005), in which this Court adopted the reasoning of Judge Griffin's dissent in the Court of Appeals to reverse and find that "the proximate cause" of the deaths of four children in a fire was "the fire itself, not [the firefighter] defendant's alleged gross negligence in fighting it." *Dean v Childs*, 262 Mich App 48, 61; 684 NW2d 894 (2004) (Griffin, J, dissenting). While Plaintiff does not agree with the outcome in *Dean* and believes that the facts

of that case, viewed in the light most favorable to the non-movant and with all reasonable inferences made in non-movant's favor, presented a question of material fact for the jury on the issue of "the proximate cause," it is additionally readily factually distinguished and not controlling.

Defendant argues this case parallels *Dean* and "the proximate cause" of William Harman's death is "not the lifeguard's failure to rescue, but whatever caused Beals to not resurface." (Reply to Application, p 1). However, there is no indication in the record as to what caused Beals to not resurface in time to provide a window of opportunity for his resuscitation aside from Harman's complete inattention to his lifeguarding duties in violation of Rule 325.2198(3)(e) of the Michigan Administrative Code and failure to act.[15] Defendant deflecting blame to some unknown, entirely speculative superceding cause such as a preexisting medical condition as the proximate cause to bar Plaintiff's claim certainly does not view the evidence in the light most favorable to Plaintiff, with all reasonable inferences made in Plaintiff's favor, as is required.

Drowning is set forth as the cause of death in the autopsy report in this case,[16] but Harman's uncontested gross negligence, his inattention to his lifeguarding duties and failure to

[15] As provided in Gerald Dworkin's preliminary expert witness report:

> The autopsy findings stated the cause of death was drowning and the manner of death as accidental and indicated "congested and edematous lungs with abundant frothy edema fluid in the airways." This indicates that William Beals did not experience a sudden cardiac arrest and that he progressed through the drowning process as his distress went unrecognized. It is also important to note that "autopsy revealed no significant external injuries and no internal injuries of the head, neck, chest, abdomen or pelvis were identified." According to Sparrow Forensic Pathology, the "information regarding the circumstances surrounding the death of William Beals is obtained from the medical examiner investigator report (Allegan County Medical Examiner's Office), emergency medical services and emergency department medical records available for review, and police reports (Prairieville Township Police Department)." [Exh 10, p 12.]

[16] (Exh 9, p 6; Exh 10, p 12).

act, is the last known and most immediate, efficient, and direct causative agent of that mechanism, which is a fatal "process of experiencing respiratory impairment from submersion or immersion in liquid." Nothing else intervened. (Exh 10, p 15). In a house fire scenario such as *Dean*, the fire itself is not identified as the cause of death, typically smoke inhalation is.[17] In *Dean*, the fire was the last most immediate efficient and direct causative agent, not the asserted gross negligence of the firefighter, Jeffrey Childs. Further, unlike the present case, in *Dean*, evidence of Childs' gross negligence as a causative agent was not established via an expert witness, just a fellow fireman's affidavit, and the fire was still the last and most immediate, efficient and direct causative agent, i.e., the children in *Dean* still died from smoke inhalation as a direct and proximate result of the fire. See, e.g., *Thompson v Rochester Community Schools*, unpublished opinion per curiam of the Court of Appeals, issued Oct 26, 2006 (Docket No. 269738), lv denied 478 Mich 889 (2007) (Exh 20):

> . . . Irrespective of the defendants' conduct in *Dean*[*v Childs*] and *Love*[*v City of Detroit*], the fires were "but for" causes of the decedents' deaths in those two cases. Accordingly, the plaintiffs in those cases were to a certain extent limited in their attempts to characterize the defendants' actions as the proximate cause of their decedents' deaths.
>
> In the present case, however, there was admissible expert testimony indicating that a condition such as that suffered by . . . [Plaintiff's decedent] would not typically result in death in the absence of improper care and treatment. Therefore, the expert testimony supported a finding that defendants' conduct-and not . . . [Plaintiff's decedent's] medical condition itself-was the "but for" cause of . . death. On the basis of this evidence, reasonable jurors could have honestly concluded that but for defendants' conduct, . . . [Plaintiff's decedent] would have survived. [*Id.* at *14-*15.]

This case is even more compelling that *Thompson* in distinguishing *Dean* and *Love*, because here, in addition to Gerald Dworkin's opinion that Beals's death "could have been and

[17]A Reporter's Guide to Fire and the NFPA [National Fire Protection Association], "The Consequences of Fire," http://www.nfpa.org/press-room/reporters-guide-to-fire-and-nfpa/consequences-of-fire (accessed Jan 10, 2015) (attached as Exh 19).

should have been easily prevented," that Harman's gross negligence resulted "in the prolonged, unrecognized, and fatal submersion" of Beals, and that timely rescue would have provided a window of opportunity "for a successful outcome with early CPR, early defibrillation, and early Advanced Cardiac Life Support," there is no evidence of any preexisting medical condition for Defendant to point to as being "the proximate cause" in place of Harman's gross negligence. (Exh 10, p 32).

Defendant's Reply Brief in support of his Application falsely asserts that Plaintiff relies on the unpublished Court of Appeals opinions in *Avery*, *Anderson*, and *Turner*, because it is unable to distinguish *Dean*. (Reply to Application, p 2). On the contrary, *Dean* is readily distinguished herein and each of those cases presents a far more comparable factual scenario to this case than *Dean*. Defendant falsely claims *Avery* is inconsistent with *Dean* and speculates that this is because it was decided March 22, 2005 before this Court's November 5, 2005 reversal *Dean*. (Reply to Application, p 2). On the contrary, *Avery* is not inconsistent with *Dean* and this Court denied defendant's application for leave to appeal in *Avery* on January 30, 2006 (and likewise denied the application for leave to appeal in *Anderson* and vacated its order granting leave to appeal in *Turner*) well ***after*** its decision in *Dean*.

A young man swimming in a pool with an on-duty lifeguard (who has an affirmative duty to pay attention and mind swimmers' safety) presents a materially different scenario than a firefighter coming upon a raging house fire, as was the case in *Dean*. Water itself is benign and not a causative agent of death like a fire. Something else causes the person to "experience[e] respiratory impairment from submersion or immersion in liquid," and in this case the evidence demonstrates that the last significant causative agent was Beals' gross negligence through complete inattention to his duties in clear violation of Mich Admin Code R 325.2198(3)(e).

Swimmers are entitled to rely and depend upon the on-duty lifeguard performing his duties to watch for and attend to persons in distress in the designated area and such reliance is readily foreseeable. It may well be that Beals would not even have participated in the student swim had a lifeguard not been present.

For illustrative purposes it is helpful to analogize this case's factual scenario to another recreational activity where the risk of injury is presented by something like water (and unlike fire) that is, of itself, relatively benign, rock-climbing. The lifeguard, William Harman, can be viewed as the belayer, William Beals can be analogized to the rock climber and the water in the pool can be analogized to the rocks below onto which the climber can potentially fall and be injured. A "belayer" is one who "provide[s] security to (a climber) by paying out or drawing in rope, often through a braking device, in readiness to break a potential fall." American Heritage Dictionary of the English Language (5th ed. 2011). If the belayer utterly fails to pay attention and mind the rope and the climber (who knows the belayer is present and is entitled to rely on that person performing his designated duties) falls and dies due to this omissive, grossly negligent conduct, certainly there would be a question of fact as to whether the belayer's conduct was the one most immediate efficient and direct cause of death, not the decision of the rockclimber to go rockclimbing in the first place, not the rock struck upon the fall and not the resultant brain injury. Likewise, in this case, if the on-duty lifeguard violates Mich Admin Code R 325.2198(3)(e) and pays absolutely no mind to "the proper supervision of persons using the swimming pool" or "person[s] in distress," and a person drowns, there is certainly likewise a question of material fact as to whether that lifeguard's conduct was the one most immediate, efficient and direct cause of a resultant death, not the decision to go swimming in the first place, not the water causing the respiratory impairment and not the resulting final mechanism of the

body's death.[18]

VI. CONCLUSION AND RELIEF REQUESTED

The Court of Appeals majority properly viewed the evidence to find a question of material fact as to whether William J. Harman's grossly negligent conduct was "the proximate cause" of William T. Beals' injury and death.

If a jury question could ever exist as to "the proximate cause" in a failure to rescue or render aid setting, it exists here. Viewing the evidence and all reasonable inferences in non-movant's favor, a reasonable jury could readily conclude that William J. Harman's grossly negligent conduct in utterly failing to attend to his duties as a lifeguard during a student swim for disable students was "the proximate cause," the one most immediate efficient, and direct cause of William T. Beals' drowning death. Mr. Beals' family has suffered a tragic loss and their day in Court should not be summarily denied them on these facts.

Accordingly, this Honorable Court should deny Defendant Harman's Application for Leave to Appeal so that this matter can be remanded to the trial court for further proceedings.

Respectfully submitted,

FIEGER, FIEGER, KENNEY,
GIROUX & HARRINGTON, P.C.

Dated: February 3, 2015

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[18] In contrast, a firefighter coming upon a raging housefire as in *Dean*, presents a far different fact scenario that would be comparable to a rescuer coming upon the rockclimber *after he has already slipped* and is falling to the rocks below.

STATE OF MICHIGAN
IN THE SUPREME COURT

THERESA BEALS, as Personal Representative of the Estate of WILLIAM T. BEALS, Deceased,	Supreme Court No. 149901
Plaintiff-Appellee,	Court of Appeal Case No. 310231
v	Barry County Circuit Court Case No. 11-45-NO Hon. Amy McDowell
STATE OF MICHIGAN and WILLIAM J. HARMON, jointly and severally,	
Defendants,	
WILLIAM J. HARMON, jointly and severally,	
Defendant-Appellant.	

_____/

PROOF OF SERVICE

Matthew D. Klakulak, being first duly sworn, deposes and states that she is not a party to the above-entitled action and that on the 3rd day of February, 2015, he served copies of Plaintiff-Appellee's Supplemental Brief for Purposes of MOAA, exhibits thereto, and this Proof of Service upon:

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via the Court's TrueFiling system and electronic mail, per the agreement of the parties.

/s/ Matthew D. Klakulak
Matthew D. Klakulak